ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Jason D. Oxman
General Counsel

8 December 2004

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WCB Docket Nos. 01-338, 04-313

Dear Ms. Dortch:

On December 7, 2004, Qwest Communications (Qwest) filed an *ex parte* letter and memorandum in the above-referenced dockets.[1] In its filing, Qwest argues that the Commission should adopt what it terms a "competitive market" test that would exempt from unbundling those geographic areas where the Commission's impairment test would otherwise find competitor impairment for certain network elements. Such action is necessary, according to Qwest, because the Commission's contemplated impairment analysis fails to take account of "competition in the relevant market," which Qwest believes to be retail communications services offered by non-incumbent LECs.[2]

In the first instance, it is important for the Commission to recognize that Qwest did not accidentally file this new impairment proposal – found nowhere else in the record in this proceeding -- one day before the issuance of the Commission's so-called "sunshine" notice. Rather, Qwest clearly designed its advocacy so as to deny competitive carriers any realistic opportunity to respond on the record to the complicated economic and policy questions raised by Qwest's proposal.[3] Were the Commission to rely in any way on Qwest's late submission, thereby providing less than 24 hours for response to Qwest's proposal before issuing its sunshine notice, the Commission would effectively foreclose any record response.[4] Should the Commission wish to explore Qwest's new

---

[1] Letter from Cronan O'Connell, Vice President-Federal Regulatory, Qwest Communications, to Marlene Dortch, Secretary, FCC, WCB Docket Nos. 01-338, 04-313 (Dec. 7, 2004) (Qwest Dec. 7 Memorandum).
[2] Qwest Dec. 7 Memorandum at 1.
[3] *See MCI Telecommunications Corp. v. F.C.C.* 57 F.3d 1136, 1140 (D.C. Cir. 1995) ("The APA requires the Commission to provide notice of a proposed rulemaking 'adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.'") (*quoting Florida Power & Light Co. v. United States*, 846 F.2d 765, 771).
[4] It would be particularly troubling for the Commission to adopt Qwest's late filed submission with only one day's record development, given the Commission's recent representation to the D.C. Circuit that issues of ILEC retail market share such as those raised by Qwest are "novel and complex, and potentially far

proposal, it can (and should) issue a further notice of proposed rulemaking (FNPRM) together with the Commission's order in the above-referenced dockets. Such a FNPRM will permit the Commission to solicit a full record from all interested parties in a time period appropriate for response to Qwest's proposal (in other words, longer than the 24 hours that Qwest timed its filing to permit).[5] In any event, the Commission must develop the record necessary for a complete analysis of Qwest's new proposal before adopting it, or any variation thereof, as a Commission holding.[6]

Qwest also concedes that the issues it raises in its 11th hour *ex parte* filing are squarely presented in the petition for forbearance that Qwest filed, and on which the Commission has already solicited comment.[7] Qwest notes that it has "filed a petition for forbearance from dominant carrier regulation," but argues that the process for the Commission to rule on its petition is "cumbersome and uncertain."[8] Thus, Qwest contends that the Commission should address its forbearance request in the pending Triennial Review Remand proceeding, even though Qwest never suggested this idea in the nearly four months since the Commission opened the instant proceeding, and the

---

reaching in their effect." *See In re Mid-Rivers Telephone Cooperative*, No. 04–1163, Opposition Of The Federal Communications Commission To Petition For A Writ Of Mandamus, at 1 (D.C. Cir., filed Aug. 11, 2004). In *Mid-Rivers*, the Commission opposed a mandamus filing by the petitioning CLEC, Mid-Rivers, which asked the Commission to declare it an ILEC, pursuant to section 251(h)(2) of the Act, because Mid-Rivers claimed to have near-ubiquitous retail market share in Terry, Montana. Based on Mid-Rivers' claim to have substantially replaced Qwest as the ILEC in that geographic market, the Commission opened a proceeding to examine whether Mid-Rivers' request should be granted. Qwest opposed Mid-Rivers' filing, and the Commission has yet to rule on the petition. Similarly, Qwest in its *ex parte* submission in the instant proceeding claims that it is "no longer the dominant carrier" – in other words, no longer an ILEC -- where it has lost market share to retail competitors, and thus it should not be subjected to ILEC regulation. Qwest Dec. 7 Memorandum at 2. In the Mid-Rivers mandamus proceeding, the Commission represented to the D.C. Circuit that questions related to whether a carrier is subject to regulation as an ILEC when it controls a certain percentage of the retail market are "potentially far reaching in their effect" and could not be quickly decided (even though over two years had passed since Mid-Rivers initially petitioned the Commission). If two years is insufficient time for the Commission to develop a sufficient record to resolve that question as to Terry, Montana, one day is certainly insufficient time for the Commission to develop the record to resolve that question as to the entire nation.

[5] The fact that ALTS was able to informally obtain a late copy of Qwest's submission – which has not yet appeared in the Commission's electronic filing system, thus denying most parties the opportunity to comment – in no way cures the lack of notice to parties that the Commission would consider adopting a proposal along the lines set out by Qwest for the first time in this 11th hour filing. *See MCI v. FCC*, 57 F.3d at 1142 ("We have repeatedly held, however, that each interested party is not required to monitor the comments filed by all others in order to get notice of the agency's proposal; hence, the comments received do not cure the inadequacy of the notice given."). *See also American Fed'n of Labor v. Donovan*, 757 F.2d 330, 340 (D.C.Cir.1985) (refusing to conclude, based upon comments filed by one party, that all parties before court had actual notice).

[6] *See MCI v. FCC*, 57 F.3d at 1142 ("[T]his court has made it clear that an agency may not turn the provision of notice into a bureaucratic game of hide and seek.").

[7] Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha MSA, WCB Docket No. 04-223 (filed June 21, 2004) (Qwest Forbearance Petition). In its petition, Qwest requests relief from sections 251(c) and 271 of the Communications Act of 1934, as amended (47 U.S.C. §§ 251(c), 271) on the basis of its claim that it is no longer dominant in the Omaha, Nebraska MSA. In addition, Qwest asks the Commission to eliminate regulation of Qwest as a dominant carrier and as the ILEC in the Omaha MSA.

[8] Qwest Dec. 7 Memorandum at 2.

Commission never provided any indication that it would address Qwest's forbearance petition in the context of the pending remand from the D.C. Circuit. In short, despite the fact that Qwest filed a forbearance petition seeking immunity from otherwise applicable unbundling obligations in Omaha, Qwest now appears to have second-guessed its regulatory strategy. Qwest now proposes that ILECs "should not be required to file a forbearance petition for communities marked by significant levels of existing facilities-based competition.[9] Rather, Qwest's proposal posits that an ILEC's unbundling obligation "would be removed automatically" upon a "straightforward showing" by the ILEC that sufficient competition has developed in the relevant market.[10] Qwest's contention that a decision on its pending forbearance petition is "uncertain" is baseless, because the Commission has a statutory deadline within which it must address Qwest's request, thus guaranteeing rapid resolution of Qwest's proposal.

Although Qwest is certainly correct that resolution of impairment issues is appropriate in the Commission's pending Triennial Review remand proceeding, Qwest is not correct that the Commission can adopt, based on Qwest's 11th hour filing, a radical new statutory analysis without the benefit of a full record. Should the Commission elect to adopt a FNPRM to explore Qwest's new proposal, the FNPRM should ask targeted questions that solicit comment on some of the more pertinent economic and policy issues set forth in Qwest's December 7 *ex parte* letter.[11] In its filing, Qwest proposes the following new standard: "Under the statutory impairment test, the [FCC] cannot order that a network element be unbundled unless it is demonstrated that competition in a relevant market will be impaired without access to that unbundled element at [TELRIC] prices."[12] In order to assist the Commission in assembling a FNPRM that seeks comment on this new proposed standard, ALTS sets out below a partial list of issues on which the Commission should solicit record responses from interested parties.

In its late-filed *ex parte* letter and memorandum, Qwest cites the Omaha MSA, subject of its pending forbearance petition, as an example of a geographic area in which the Commission should immediately eliminate all unbundling, notwithstanding the impairment that the Commission might find pursuant to the test adopted in the Triennial Remand proceeding. Specifically, Qwest claims that competitors (primarily cable companies) currently control over 50% of the residential broadband market in Omaha.[13] Thus, pursuant to Qwest's newly minted impairment test, unbundling in the entire MSA would be eliminated. In its FNPRM, the Commission should seek comment on the most

[9] *Id.* at 3.
[10] *Id.* at 3.
[11] Qwest made similar wide sweeping assertions, unsupported by any record evidence, in its original forbearance filing. For example, in its forbearance petition, Qwest makes the blanket statement that there are no barriers to entry in the Omaha MSA because "[c]ompetitive providers have other market entry options in those areas where they choose not to deploy facilities" and that it "is no longer the exclusive source of switching and local loop facilities in the Omaha MSA." Qwest Forbearance Petition at 14, 17. In its pleading, Qwest did not identify those alleged alternative market entry options for CLECs in Omaha, nor did it give any examples of alternative wholesale loop facilities available to CLECs in Omaha. Should it decide to open a FNPRM in response to Qwest's new proposal, the Commission would presumably ask Qwest for more specifics on these alternatives.
[12] Qwest Dec. 7 Memorandum at 1.
[13] *Id.* at 2-3.

obvious potential impact of Qwest's framework – the elimination of all competitive residential broadband offerings via UNEs in any market, such as Omaha, where the ILEC claims the existence of robust retail competition. In addition, the Commission should seek comment on Qwest's efforts to conflate the retail and wholesale markets together in Omaha and, presumably, in the rest of its ILEC region. In its forbearance petition, Qwest argues it is "no longer the dominant carrier in the Omaha MSA telecommunications market, and that Qwest no longer enjoys market power in the Omaha MSA."[14] Qwest's claim is based solely on the existence of limited retail competition for Qwest's own end user services. While retail competition may reduce Qwest's ability to raise *retail* prices above competitive levels, or to restrict its output for retail services, it will not constrain Qwest's anticompetitive behavior in the *wholesale* market for UNEs, where overwhelming evidence on the record in the instant proceeding confirms that Qwest is the sole supplier.

It is also important for the Commission to note that, pursuant to Qwest's proposal set out in its December 7 *ex parte* letter, the task of defining the relevant geographic market for purposes of impairment analysis would not be completed by the Commission; rather, "it would be up to the petitioning ILEC to choose and define the relevant geographic market in which to seek relief."[15] As the Commission is well aware, the definition of the relevant market is a lynchpin of antitrust market analysis of the type Qwest proposes here, and allowing the party of interest to define the relevant market strips the Commission of its ability to fulfill its statutory obligations. For example, in a joint petition for approval of their merger, Cingular Wireless and AT&T Wireless claimed that a "nationwide geographic market, rather than a set of local markets, is appropriate for assessing the effects of [the] transaction."[16] The Commission rejected the parties' proposed geographic market definition, concluding that the nature of wireless consumer offerings suggested a local geographic market definition was more appropriate for analysis of the potential anticompetitive impact of the proposed combination.[17] Similarly here, in order to determine whether, pursuant to Qwest's proposed impairment test, the ability of the ILEC monopolist to impose a small, non-transitory price increase without losing market share (in other words, maintaining profitability) depends on the

[14] Qwest Forbearance Petition at 5.

[15] Qwest Dec. 7 Memorandum at 3. The relevant geographic market is generally defined as the region in which a hypothetical monopolist that is the only producer of the relevant product or service in the region could profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. *See generally* DOJ/FTC Merger Guidelines § 1.21.

[16] In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, File Nos. 0001656065, et al., and Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses, File Nos. 0001771442, 0001757186, and 0001757204, and Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses, File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04, WT Docket Nos. 04-70, 04-254, and 04-323, at ¶ 83 (rel. Oct. 26, 2004).

[17] *Id.* at ¶ 87 ("[W]e reject the Applicants' suggestion of a national geographic market..").

Commission's definition of the relevant geographic market.[18] Allowing the ILEC to set the parameters of that analysis by defining the relevant market, and then ensuring that relief flowing from the market definition is self-executing, is the height of absurdity. Qwest proposed virtually no limitations on its ability to set the geographic market, suggesting only that the geographic market "could normally not be smaller than a wire center."[19] The Commission should seek comment on such geographic market issues.

As part of its FNPRM, the Commission should also seek comment on the product market definitions set out in Qwest's 11th hour impairment proposal. Not surprisingly, Qwest proposes no product market limits on the unbundling relief that would flow "automatically" from an ILEC demonstration of some level of retail competition in the geographic market (as defined by the ILEC). For purposes of the Commission's analysis of Qwest's proposal, definition of the appropriate product market is as vital as a carefully constructed geographic market definition.[20] Specifically, Qwest proposes that "[o]nce competition within a market has reached a certain level, we submit that all ILEC facilities should be presumed to be subject to competition because the ILEC has no monopoly power which could justify further unbundling of any services or facilities."[21] Thus, rather than suggesting an analysis of the relevant product market – that is, whether retail competition in a specific, defined product market has reached a level such that unbundled network elements used to provide those specific retail services, or their substitutable analogues, should no longer be available to requesting carriers – Qwest proposes that *all* unbundling, regardless of product market, would be eliminated. This is clear nonsense, as the Commission would have to, at a minimum, analyze whether the retail products that the ILEC claims are robustly competitive are reasonably interchangeable by consumers for the all other retail products offered by competitive carriers using unbundled network elements. Put another way, the Commission must explore in its FNPRM whether, in the eyes of the consumer, the retail product that Qwest claims is competitive is a substitute for all other retail products that will no longer be available as a result of the total elimination of UNEs in the geographic market. As Qwest would have it, "all that would be required would be for the ILEC to file a petition with the FCC defining the market and demonstrating the market share percentage that the ILEC had fallen below the 70% margin specified."[22] The Commission cannot possibly adopt this framework without a full record on the product market implications of Qwest's proposed impairment analysis.

Finally, Qwest proposes a "potential" competition analysis that would permit an ILEC to certify that 40% of premises within the relevant geographic market (as defined

---

[18] The Commission's analysis would necessarily examine whether a consumer, faced with such a price increase from Qwest, could find another service provider willing to offer an identical substitute offering for a lower price than offered by Qwest.

[19] Qwest Dec. 7 Memorandum at 3.

[20] A relevant product market is the smallest group of competing products or services for which a hypothetical monopolist in a geographic area could profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products. *See* DOJ/FTC Merger Guidelines at §§ 1.11, 1.12. This test is commonly referred to as the "hypothetical monopolist test."

[21] Qwest Dec. 7 Memorandum at 3 n.5.

[22] *Id.* at 3.

by the ILEC) are "passed" by competitive facilities.[23] Qwest concedes that such an analysis "may be more sophisticated and fact-based," and thus Qwest recommends that such an ILEC petition be automatically granted after 180 days, rather than the 90 day period for automatic grant pursuant to Qwest's "actual" competition impairment test.[24] The Commission must seek comment on whether such a potential competition analysis has any place in its impairment test for specific UNEs.

Respectfully submitted,

/s/ Jason Oxman

Jason D. Oxman
General Counsel
Association for Local Telecommunications Services
888 17th Street, NW, Suite 1200
Washington, DC 20006
Office: 202-969-2587
Fax: 202-969-2581
E-mail: joxman@alts.org

[23] *Id.* at 4.
[24] *Id.* at 4.